Jan 28 2000

(14)

No. 99-312

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF FOR THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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January 28, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether federal statutes and regulations relating to the uniformity and financing of grade crossing signals, promulgated pursuant to the Federal Highway Safety Act and Federal-Aid Highway Act, preempt state common-law requirement that railroads maintain safe grade crossings?

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BRIEF FOR THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The amicus, United Transportation Union, represents the craft of employees in the railroad industry known as engineers, conductors, trainmen, brakemen, yardmasters, hostlers and hostler helpers.* It is the largest railroad

* Pursuant to Rule 37.6, Amicus United Transportation Union certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Amicus and its counsel made any monetary contribution to the preparation or submission of this brief.

Both parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court.

union in the United States. Its members are on board each train that is involved in a rail-highway grade crossing accident, many of whom suffer casualties in such accidents. The sole interest of UTU here is to help assure that the nation's crossings become safe for both the public and railroad employees.

SUMMARY OF ARGUMENT

1. Based upon current funding levels, it will take 100 years to safely equip highway-railroad grade crossings. Federal funding for crossings began in 1916 and currently only 20.4% of the 261,266 public and private crossings have both gates and lights.

2. The legislative history and the FRSA statute itself confirm that Congress intended to preserve *any state law* (which includes state common law) until the Secretary promulgates a specific rule regulation, or order covering the subject matter. The congressional hearings and committee reports buttress the point that states retain the right to continue in force *any* law until the Secretary issues a standard covering the subject matter. When coupling this with the court's consistent preservation of traditional areas of state police powers, the state common law should be preserved in this case.

3. Because of the *local safety hazard* savings clause in the FRSA, the preemption provisions do not foreclose tort liability even where crossings are improved. Even assuming *arguendo* that the FHWA regulations cover the subject matter of the general adequacy of crossing warning requirements, the savings clause in the FRSA allows recovery here. A state may impose more stringent requirements where there exists a *local* safety hazard. Nothing is more local in railroad safety than a particular crossing which is unsafe. The Court noted this possible

exception to preemption in *Easterwood*, 507 U.S. at 675 n.5.

Congress was aware of the tragedies occurring at crossings when it adopted the FRSA, and nowhere did it suggest that the public should be foreclosed from seeking recovery in a crossing accident.

4. If Congress had intended to preempt state common law, it would have so stated as it did in other legislation. (see, e.g. 12 U.S.C. § 1715z-17(d), -18(e) and 17 U.S.C. § 301(a).

5. The Federal Railroad Administration, the agency which promulgated the track regulations upon which the Court relied in *Easterwood*, disagrees with the Court regarding train speed. The FRA does not agree that the track regulations *substantially subsume* the subject matter of train speed. See 62 Fed. Reg. 36138, 36143-44 (July 3, 1997). It stated in the NPRM that *FRA has only an indirect role in determining speed limits.* It also said that . . . *FRA has never assumed the task of setting train speed.* Therefore, the Court should take this opportunity to reconsider its conclusions regarding train speed as it relates to preemption.

6. The Federal Highway Administration has long recognized that the federal grade crossing safety standards are minimum. As far back as 1945, FHWA's predecessor agency recognized that the standards were necessarily minimum. (See General Administrative Memorandum 288 (Oct. 9, 1945). See, also, U.S. Bureau of Public Roads Policy and Procedures Memorandum No. 40-2 (Oct. 12, 1954). Throughout a memorandum dated October 8, 1976 to all regional federal highway administrators, the directors of the Office of Highway Safety and the Office of Engineering, it was emphasized that the federal standards were minimum.

7. The railroad industry has sought relief from the consequences of *Easterwood* both in Congress and the Department of Transportation, and was unsuccessful. See *Hearings on Railroad Safety Before the Subcommittee on Transportation and Hazardous Materials of The House Committee on Energy and Commerce*, 103rd Cong. 79-80 (November 1993 and June 15, 1994); *Hearing on Oversight and Re-authorization of Rail Safety Programs and S. 2132, the Federal Railroad Safety Authorization Act, Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 46 (June 14, 1994).

Also, Senator John Danforth on May 18, 1994 introduced S. 2127 which would have provided the relief sought by the railroads. Congress did not adopt the provisions. Having failed in Congress, the railroads attempted to gain relief through the FRA. (See FRA Docket No. RSGC-6). In the NPRM, the FRA proposed to prohibit railroads from selecting and installing warning systems at crossings. This would have eliminated any duty upon the railroads for crossing improvements, and freed them to argue in tort litigation that, since their duty was eliminated, there could be no liability. Hearings were conducted on June 5, 1995, and on August 8, 1997 the FRA terminated the proceeding. See 62 Fed. Reg. 42733.

8. Presidential Executive Order 13132 was issued on August 4, 1999 (64 Fed. Reg. 43255). In it Federal agencies are barred from concluding that they have the power to issue preemptive regulations unless there is clear evidence that Congress intended such a result.

ARGUMENT

I. Statistics Belie the Railroad's Arguments—At Current Spending Levels, It Wiill Take 100 Years to Fully Equip Crossings.

A. To date the railroads have concentrated their safety efforts on seeking government funds, both state and federal, allocated for crossing safety. The largest funding source is federal government appropriations. But such funding is minimal in relation to the needs to make crossings safe for the public. The closure of crossings is a high priority, but the practical political problems encountered at local levels to retain crossings because of convenience to motor vehicle travelers usually prevails. The fallacy in the railroad's position is that the government has *substantially subsumed* the subject matter of highway-rail grade crossing safety by appropriating funds to be used to improve the safety at such crossings. The funds allotted by Congress over the years has only touched the surface of protecting the public from train accidents. The obvious limitations of funding to eliminate crossing hazards has been recognized for many years. In the Hearing on the FY 71 supplemental appropriations, the FRA Administrator's testimony states:

> If every grade crossing could be protected with an active device, the problems experienced could be reduced to minimum levels. In view of generally limited monetary resources, however, it is, and will continue for many years to be. necessary to protect many grade crossings with devices that only inform the motorist of hazard and place upon him the responsibility for a decision of whether or not it is safe to proceed. As a result, it is believed that the greatest and immediate opportunity for the improvement of the motorists' decision-making process is in the area of passive protection of grade crossings. There will

always be a need for a family of passive devices which can be tailored to meet the range of situations which it may not be economically feasible to treat with active devices.

Hearings on FY71 Supplemental Appropriations Before the House Committee on Appropriations, 91st Cong., 2d Sess. 665 (1971). At the current rate of Congressional funding, it will take approximately 100 years to fully equip crossings with adequate safety features.

Deaths at highway-rail crossings rank # 1 among rail-related deaths. *Annually, fatalities caused by collision between automobiles, trucks and trains, and fatalities from people being illegally on railroad property and tracks usually account for more than 90% of all railroad-related deaths. Hearings on Re-authorization of the Federal Railroad Administration: Before the Subcommittee on Railroads of the House Committee on Transportation and Infrastructure,* 105th Cong., 2d Sess. 62 (March 26, 1998). For example between 1994-1998 a total of 2,574 persons died in collisions at crossings and 8,308 were injured. There are approximately 4,000 collisions annually. FRA Docket No. 1999-6439, Notice No. 1, 65 Fed. Reg. 2230 (Jan. 2000).

In 1998 nationwide, there were 261,266 highway-rail crossings, 158,590 of which were located at public crossings. Based on the latest published data available, 47.6% (75,558) of all public crossings were equipped only with crossbucks. 17.7% (20,098) had flashing lights, and 20.4% (32,406) had both gates and lights.[1] The cost to improve a crossing with flashing lights and gates is approximately $150,000; improved four-quadrant gates cost

[1] *Railroad Safety Statistics, Annual Report 1998,* Tables 8-2 and 8-5, Federal Railroad Administration (July 1999).

nearly $1 million; and a standard grade separation is $3 million.[2]

Approximately every 90 minutes someone is struck either as a consequence of a motor vehicle-train collision or pedestrian-train collision. Last year there were 3,375 collisions involving motor vehicles and trains. Incidents at public crossings equipped with only crossbucks accounted for almost 37.7% of the total, twice the number as compared with crossings equipped with lights or either gates and lights.[3]

Trains cannot stop in a short distance. A freight train with 100 loaded cars traveling 50 mph needs approximately 1⅓ miles to stop. See FRA Docket No. 1999-6439. *supra,* 65 Fed. Reg. 2230. An eight car passenger train going at a speed of 79 mph needs 1⅛ miles to stop.

Experience demonstrates that drivers of motor vehicles approaching a crossing react differently to the various active and passive warning signs and signals, depending upon their individual experiences. Obviously, where just crossbucks exist, drivers are much less likely to *stop, look, and listen* as when approaching an active signaled crossing. Research has shown that most motorists approaching grade crossings having passive warning systems do not expect to encounter a train, and approximately 70% of the motorists do not look for trains. *See Proceedings, 1995 National Conference on Highway-Rail Safety,* p. 36 (July 16-18) (Publisher: TRANSCOM, College Station, Tex.).

[2] National Transportation Safety Board, *Safety Study: Safety at Passive Grade Crossings, Volume 1: Analysis,* NTSB/SS-98/02 at pp. vii and 5 (1998); United States General Accounting Office, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety,* GAO/RCED-95-191 at p. 33 (1995).

[3] *1998 Railroad Safety Statistics, supra,* Table 9-4.

It doesn't take a magic wand to correct the horrendous safety problem at crossings—it only takes funding. Either construct highway grade separation overpass or underpass; build gates at the crossings that are impenetrable; or close the crossings. At present the railroads take the untenable position that they should not be legally responsible for crossing accidents because of federal preemption. But Congress has intervened to provide minimum funding and mandating various studies, and education endeavors. While the crossing improvements must be uniform, that shouldn't absolve a railroad from using reasonable care to keep all crossings safe.

B. Since 1916, Congress has made Federal funds available for grade crossing safety improvement. The Federal-Aid Road Act of 1916 (Pub. L. 64-155, 39 Stat. 355) provided funds for *rural post roads*. The grade crossing safety improvement projects were eligible for funding based on a 50-50 sharing basis. In 1933, Congress enacted the National Industrial Recovery Act (Pub. L. 73-67, 48 Stat. 200). Federal funds were authorized for crossing safety, but the previously enacted 50-50 matching cost provision was eliminated. In 1970, Congress adopted the Federal Railroad Safety and Hazardous Materials Transportation Control Act (Pub. L. 91-458) and the Federal-Aid Highway Act (Pub. L. 91-605), both containing provisions that the Secretary shall study and issue a report on rail-highway crossing problems. Based upon some of the recommendations submitted by the Secretary, Congress in the Federal-Aid Highway Act of 1973 (Pub. L. 93-87) appropriated $175 million over three years for highway rail crossing safety improvements on the federal-aid highway system. The money was required to be distributed on a basis of State matching funds of 10%. At least half of the funds were required to be used for installation of warning devices at crossings.

A survey of all crossings was also required in the legislation. The Federal-Aid Highway Act of 1976 (Pub. L. 94-280), provided $250 million over a period of 27 months for the crossings on the Federal highway system, and an additional $168.75 million for crossings not on the Federal-aid system. In 1978 (Pub. L. 95-599) and 1982, Congress provided $198 million per year for four years in each Act. The distinction between crossings on and off the Federal-aid system was deleted, and the funding was based upon a 50% sharing basis related to the number of crossings in each State. In 1987, the Surface Transportation and Uniform Relocation Assistance Act (Pub. L. 100-17) provided $160 million per year for 5 years. In that Act, the Secretary was required to conduct a study of the crossing improvement and maintenance needs. The report was submitted in 1989, entitled *Rail-Highway Crossings Study*. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Pub. L. 102-240), continued the $160 million funding authorized in the 1987 law. Also there were provisions in the Act for additional funding, and one was added to allow 100% financing of certain improvements. Congress authorized 10% of the total funding of surface transportation to be set aside for various safety programs, including crossing safety. In § 1007 of ISTEA, states were required to spend $149 million on highway-rail crossing improvements, and at least 50% of these funds to be spent on the installation or upgrading of warning devices. The remainder of the funds were to be spent on additional warning devices or on other ways of eliminating crossing highway-rail crossing hazards. Congress established a formula in which States would receive funds based upon the number of crossings, highway route, miles, geographical area and population. Crossing accidents and casualties are not part of the formula. Additionally, the

States received over $116 million which could be spent on hazard elimination at crossings or on highways. All of the public highway-rail crossings were eligible. Section 1010 of ISTEA authorized $30 million over 6 years for the elimination of hazards of both public and private highway crossings in up to 5 high speed corridors identified by Congress. In § 3036 there were funds for a technology demonstration program to facilitate high-speed rail service. Most of the projects address highway-rail crossings. Section 1072 requires the Department of Transportation to coordinate field testing of a vehicle proximity alert system for use on emergency, police, school busses and hazardous materials vehicles. Section 1077 required the revision of the Manual on Uniform Traffic Control Devices to grant States and local governments the authority to install STOP or YIELD signs at any highway-rail grade crossing without automatic control devices with two or more trains operating the crossing per day.

Over the six/year life of ISTEA through 1997, the FHWA has provided almost $900 million in contract authority for the rail/highway crossing program. The Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107, June 9, 1998 provides crossing funds and, additionally, expands the eligibility program to include trespasser countermeasures, railway/highway crossing education, enforcement of traffic laws, and projects at private crossings where there is an identified public benefit. *See Hearings on Re-authorization of the Federal Railroad Administration, supra* a 62-64 (March 26, 1998).

II. The Legislative History, and the Language of the FRSA Confirm That Congress Intended to Preserve *Any State Law* Until the Secretary Promulgates a Specific Rule, Regulation, or Order Covering the Subject Matter.

A. The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. *See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Committee*, 90th Cong., 2d Sess. 1-6, Serial No. 90-39 (1968). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that *Existing State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation.* Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or the state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted . . . *unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements.* . . .

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

> Sec. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, regulations or standards.

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bill, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

> To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute. . . .

Hearings on H.R. 7068, H.R. 11417, and H.R. 11478 (and similar bills), S. 1933 Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 29 (1970).[4]

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 20106 was a countervailing concern to its desire for national uniformity. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970). As stated in Senate Report:

> The committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. ***All State requirements will remain in effect*** until preempted by federal action concerning the same subject matter. (Emphasis added).

S. Rep. No. 619, 91st Cong., 1st Sess. 8-9 (1969).

> Testimony presented before the committee, as well as experience with other safety laws which have national application, seem to lead to the conclusion that the States should have a role in the total safety effort. In particular, the States should be able to impose regulations relating to local hazards so long as the regulations do not unnecessarily burden interstate commerce and are not inconsistent with federal regulations.

Id. at 5.

As Congress has explicitly stated, the FRSA as adopted *prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void*

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[4] Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, were incorporated into 45 U.S.C. § 434.

the specific rules and regulations of the state. Id. at 12. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, as in the case of the Federal-Aid Highway Act, are intended to preempt state railroad safety regulations, much less to preempt state common law protection. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

In view of the Court's consistent preservation of traditional areas of state police powers, the common law should be upheld in this case. The Court has made clear that preemption will not lie in areas traditionally regulated under States historic police power *unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *English v. General Electric Co.*, 496 U.S. 72, 78, 89 (1990). Since *Easterwood*, the Court has consistently rejected preemption defense where, otherwise, it would immunize defendants from state law tort claims. See *Medtronics, Inc. v. Lohr*, 518 U.S. 470 (1996) (re medical devices); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (airline rates); *Freightliner Corporation, et al. v. Ben Myrick*, 514 U.S. 280 (1995) (negligent design of tractor-trailer). State tort law is clearly within the States' historic police power. See, e.g., *Farmer v.*

United Brotherhood of Carpenters, 430 U.S. 290, 304 (1977), and states traditionally have imposed upon railroads a common law duty to exercise reasonable care at grade crossings.

B. There is another equally valid reason not to preempt state common law here. The applicable preemption statute is explicit that a state may continue in force *a law* until the Secretary prescribes a regulation or issues an order covering the subject matter. 49 U.S.C. § 20106. As originally enacted, the relevant words read *any law*. (45 U.S.C. § 434). The 1994 codification of the transportation laws did not intend to change the substance of the laws being amended. Pub. L. 103-272, § 1(a), July 5, 1994. The Court has construed *law* in various contexts broadly, which would include common law See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Commisioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 464 (1967); *West, et al. v. AT&T Co.*, 311 U.S. 223 (1940); *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930); See, also, *Howell, et al. v. Witman-Schwartz Corp.*, 7 F.2d 513, 514 (3d Cir. 1925); *Estate of Daniel I. Perlberg v. Ellis I. Perlberg*, 694 S.W. 2d 304, 308 (Tenn. App. 1984); *Daver v. Zabel*, 156 N.W. 2d 34, 37 (Mich. 1967). Therefore, since *common law* is included in the word *law*, then the state common law is not preempted unless substantially subsumed by a federal regulation or order. No federal regulation or order exists relating to crossings which even refers to state common law.

III. Because of the *Local Safety Hazard* Savings Clause, The Preemption Provisions of the FRSA Do Not Foreclose Tort Liability Even Where Crossings Are Improved.

First, nowhere in the congressional hearings, House/Senate reports, nor debate on the floor of Congress is there any suggestion that the public should be foreclosed from seeking recovery in a crossing accident. Congress certainly was aware of the tragedies occurring at crossings. See S. Rep. 91-619, *supra* at 4. *The committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations.* H.R. Rep. 91-1194, *supra* at 8.

Even assuming *arguendo* that the FHWA regulations cover the subject matter of the general adequacy crossing warning requirements, the savings clause in the FRSA allows recovery here. A state may impose more stringent requirements pursuant to 49 U.S.C. § 20106 where there exists a *local* safety hazard. The Court noted this possible exception to preemption in *Easterwood*, 507 U.S. at 675 n. 15, but did not elaborate. If the railroad relies on FRSA preemption, then *all* of the statutory section must be applied. This necessarily includes the savings clause regarding local safety hazards. Nothing is more *local* in railroad safety than a particular crossing which is unsafe.

The common law of each state requires that railroads exercise reasonable care in warning of the approach of their trains. Haralson & Levine, *Grade Crossings and Train Speed: Preemption*, Trial, Feb. 1991, at 26. Even under the most stringent application of the FRSA's express preemption clause, the states can regulate because grade crossings pose unique local hazards. *The sheer number of possible factors renders nationally uniform safety standards for grade crossings impractical. Id.* at 21.

The historical police powers of the states have always been jealously guarded against unwarranted intrusion by federal law particularly where, as here, the federal regulation provides no private right of action. Unlike common law, the FRSA provides no private right of action for individuals injured as a result of railroad negligence. Further, there is nothing in the FRSA to suggest that the regulations promulgated thereby established anything other than minimum standards.

In *CSX Transporation, Inc. v. Easterwood*, 507 U.S. 658 (1993) the Court interpreted the preemption provisions of the FRSA, as it applies to grade crossing litigation. It concluded that federal regulations must *substantially subsume* the subject matter of state law before preemption occurs. *Id.* at 664. The Court concluded that (1) 23 C.F.R. Part 924, which establishes priorities for addressing highway hazards and guides the implementation and evaluation of remedial measures, does not of itself establish preemption. *Id.* at 667-668; (2) the MUTCD does not cover the subject matter of tort law of grade crossings. *Id.* at 668; (3) If 23 C.F.R. §§ 646, 214(b)(3) and (4) are applicable, which require that a project for improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds participate in the installation of warning devices, state tort law is preempted. *Id.* at 670; and (4) implied preemption is not applicable in view of the above analysis. *Id.* at 673 n. 12.

The Court left open the situation whether a specific, individual hazard would bar a suit for common law tort. *Id.* at 675, n. 15. The railroad in that case was prepared to concede that preemption would not bar a suit for related tort law duties. *Id.* In applying the FRSA local safety hazard exclusion from preemption, the present case brings that issue to the Court for decision.

The current trend by railroads to seek total preemption, not only of state statutory and regulatory law, but of state common law as well, is among the most invasive and egregious of violations to the sovereignty of the states and their efforts to protect their citizens.

As with the Petitioner in *Medtronics, Inc.*, the railroad is really seeking complete immunity from any tort obligation. Similarly, as stated in the concurring opinion, *it is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

As discussed in *Medtronics*, Congress in the laws applicable in this case was primarily concerned with the issue of conflicting statutes and regulations, rather than the general duties enforced by comon law actions. 518 U.S. at 489.

IV. If Congress Had Intended To Preempt State Common Law, It Would Have So Stated As It Did In Other Legislation.

Under the FRSA, Congress limited the preemption of state law by allowing a state to *adopt* a *law, regulation, or order* relating to railroad safety until DOT prescribes a rule or issues on order. Common law tort liability was not mentioned by Congress. Had Congress intended to bar recovery for tort liability, it would have so stated, as it has done in other legislation. See, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z, -17(d), -18(e) (Supp. V 1987) (preempt any *state constitution, statute, court decree, common law, rule, or public policy*); Copyright Act of 1976, 17 U.S.C. § 301(a) (preempt *under the common law or statutes of any state*). (Emphasis added). We have not found any federal legislation which has specifically pre-

empted state common law, nor any congressional reports, or statements by members of Congress to do so.

We recognize Congress, at times, has enacted legislation which specifically allows one to seek common law claims. See, e.g. 33 U.S.C. § 1365(e) regarding water pollution prevention and control. (. . . *Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation to seek any other relief* . . .). Similarly, see 33 U.S.C. § 1415 (g)(5) regarding navigable waters.

In the present case, Congress has done neither. Therefore, it follows that the implied preemption analysis is to be applied by the Court.

V. FRA, The Federal Agency Which Promulgated the Track Regulations Upon Which the Court Relied in *Easterwood*, Disagrees With the Court Regarding Train Speed.

FRA, the agency which promulgated the track standards upon which the Court relied in *Easterwood* does not agree that those regulations *substantially subsume* the subject matter of train speed. As stated by FRA in its NPRM on July 3, 1997 regarding proposed revisions to its track standards:

> *FRA has only an indirect role in determining speed limits.* Railroads set train speed in their timetables or train orders. Once a railroad sets a train speed, it must then maintain the track according to FRA standards. . . . (Emphasis added).

62 Fed. Reg. 36138, 36144.

> Notwithstanding some of the language in Easterwood that a cursory reading may otherwise indicate, *FRA has never assumed the task of setting train speed.* Rather the agency holds railroads responsible

for minimizing the risk of derailment by properly maintaining track for the speed they set themselves. (Emphasis added).

62 Fed. Reg. at 36143-44.

Since the Court gives great weight to an agency's interpretation of its own regulations, the Court could take this opportunity to reconsider its conclusions regarding train speed and preemption.

VI. The Railroad Industry Has Sought Relief From the Consequences of *Easterwood*, Both in Congress and Department of Transportation, and Was Unsuccessful.

A. In 1994, the railroad industry attempted to obtain Federal legislation which would have provided relief to the railroads from the consequences of the Supreme Court decision in *Easterwood*. See *Hearings on Railroad Safety Before the Subcommittee on Transportation and Hazardous Materials of The House Committee On Energy and Commerce*, 103d Cong., 79-80 (November 1993 and June 15, 1994); *Hearing on Oversight and Re-authorization of Rail Safety Programs and S. 2132, the Federal Railroad Safety Authorization Act, Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 46 (June 14, 1994). At the hearing the railroads testimony stated:

> Railroad responsibilities related to grade crossings should be limited to providing states with needed train traffic and certain other crossing information, crossing safety warning device operation (if installation and maintenance is performed by railroad personnel), train operations, and crossing sight distance on railroad right-of-way.

Id at 46.

Also, Senator John Danforth on May 18, 1994 introduced S.2127 which would have provided the relief sought

by the railroads. Senator Danforth's bill provided railroads the following relief:

> GRADE CROSSING SIGNAL DEVICES.—The Secretary shall, within one year after the date of enactment of this subsection, establish nationally uniform standards regarding the allocation of responsibility for selection and installation of signal devices at public railroad-highway grade crossings.

Congress did not adopt such provisions.

B. Having failed in Congress, the railroads sought relief from the Federal Railroad Administration. (See FRA Docket No. RSGC-6). In the NPRM, FRA proposed to prohibit railroads from selecting and installing grade crossing warning systems at public highway-rail crossings. This would have eliminated any duty upon the railroads for crossing improvements, and freed them to argue in tort litigation that since there was no duty, there could be no liability. Hearings were conducted on June 5, 1995, and the railroads voiced their concern of being responsible for grade crossing improvements. On August 8, 1997 the FRA terminated the proceeding stating:

> Termination of this rulemaking is based on public comments and FRA's determination that railroad safety will not be best served by issuances of such regulation at this time.

62 Fed. Reg. 42733.

VII. The Federal Highway Adminstration Has Long Recognized That the Federal Grade Crossing Safety Standards Are Minimum.

At the outset, the *amicus* agrees completely with respondent Shanklin that Congress established only minimum protection requirements for crossings. Through the years this has been recognized by the Federal government.

Since the first Federal-Aid Road Act was adopted in 1916 and until 1958, there were at least 40 separate laws on the subject, excluding appropriation acts. S. Rep. No. 1928, 85th Cong., 2d Sess. 1 (1958). In the subsequent years there have been many other relevant enactments. With regard to the need for improved safety at crossings, Congress has consistently equated safety standards to minimum requirements and this policy has been applied by the federal government. The Federal-Aid Highway Act of 1936 authorized expenditure for highway railroad grade crossings as determined by the U.S. Bureau of Public Roads *as being adequate.* Pub. L. 74-686, 49 Stat. 1519, 1521 (1936). This language became the basis for 23 U.S.C. § 109(e). Pursuant to the various Federal-aid highway acts, the U.S. Bureau of Public Roads issued General Administrative Memorandum 288 (October 9, 1945). The Commissioners there noted that some of the standards accepted for interstate system improvements adopted at that time were *necessarily minimum value.* (Emphasis added). In the U.S. Bureau of Public Roads Policy and Procedure Memorandum No. 40-2 (October 12, 1954), which memorandum superseded the previously mentioned GAM 288, the MUTCD was accepted for application to signing and marking of federal aid projects. The said PPM states that *Designs substantially in accord with the standard enumerated herein will be acceptable to Public Roads. When standard provide both minimum and desirable values, the use of the higher value is encouraged.* (Para. 5). (Emphasis added.)

In a memorandum dated October 8, 1976, to all regional federal highway administrators, the directors of the Office of Highway Safety and the Office of Engineering pointed out that § 203(a) provided that each State should *establish and implement a schedule of grade crossing improvement and as a minimum, the schedule shall provide signs*

for all railroad-highway grade crossings. Appendix attached hereto. (Emphasis added). It further stated that the Federal Highway Administration is urged to make commitments to the State *to provide this minimum level of protection at all public crossings in the State within a reasonable period of time. . . .* (*Id.*) (Emphasis added). The memorandum went on to note that *Implementation of this program calls for, as a minimum, meeting the MUTCD standards for signing and marking at all public grade crossings both on and off the Fed-Aid System.* (*Id.*) (Emphasis added). It also notes *To this end, Federal funds are eligible to participate in the cost of labor and materials to meet this minimum requirement either under § 203 of the 1973 and 1976 Acts, 23 U.S.C. § 405, 23 U.S.C. § 219, or 23 U.S.C. § 402. . . .* (*Id.*) (Emphasis added). It is obvious from this memorandum that the federal program set the *minimum* standards to be applied for improvements at grade crossings.

The 1954 Policy and Procedure Memorandum was supeseded by the Federal-Aid Highway Program Manual. The FAHPM Transmittal 298 (March 5, 1979) at p. 6 states: *Section 203(a) of the Highway Safety Act of 1973 requires as a minimum that each State's schedule of improvements shall provide signs at all crossings.* (Emphasis added.)

VIII. The Recently Issued Presidential Executive Order 13132 Sets Out The Policy Of The Federal Government Not To Preempt State Laws.

On August 4, 1999, the President issued Executive Order 13132 (64 Fed. Reg. 43255 (Aug. 10, 1999)). It requires, among other things, that federal agencies *in determining whether to establish uniform national standards, consult with appropriate state and local officials as to the need for national standards. . . .* In addition, *where possible, defer to the States to establish standards;*

64 Fed. Reg. at 43256. Agencies are required to *closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States. . . .* Fed. Reg. at 43255.

Regarding preemption of State laws, Federal agencies are barred from concluding that they have the power to issue preemptive regulations unless there is clear evidence that Congress intended such a result. The complete text of the preemption discussion states:

> Sec. 4. Special Requirements for Preemption. Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.
>
> (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.
>
> (b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.
>
> (c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.
>
> (d) When an agency foresees the possibility of a conflict between State law and Federally protected

> interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.
>
> (e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

64 Fed. Reg. at 43256-7

CONCLUSION

For the reasons set forth herein, the decision of the court below should be affirmed.

Respectfully submitted,

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January 28, 2000

APPENDIX

APPENDIX

UNITED STATES GOVERNMENT
Memorandum

Department of Transportation
Federal Highway Administration
Washington, D.C. 20590

Date: Oct. 8, 1976

In reply HHS-10
refer to: HNG-14

Subject: Producing a Schedule in Each State for Signing and Marking All Public Railroad-Highway Grade Crossings

From: Directors, Offices of Engineering and Highway Safety

To: Regional Federal Highway Administrators Regions 1-10

As the subject matter is designated by the FHWA as a Program Emphasis Area for fiscal year 1977, this memorandum groups together the following pertinent information on this topic for your convenient reference and use:

- When the Highway Safety Act of 1973 was under consideration by the Congress, the House Public Works Committee expressed the hope that by the end of fiscal year 1976, every public railroad-highway grade crossing in America would be equipped with adequate advance warning signs and crossbucks (see page 35 of the Report of the Committee on Public Works—Federal-Aid Highway Act of 1973—House Report number 93-118).
- Section 203(a) of the Highway Safety Act of 1973 provides that each State shall establish and im-

plement a schedule of grade crossing safety improvements. As a minimum, the schedule shall provide signs for all railroad-highway grade crossings.

- Paragraph 6b (1) of the FHPM (6-8-2-1) further provides that as a first priority, each State, in cooperation with the involved railroad and any other agency having jurisdiction (e.g., State public service commissions), shall identify those grade crossings at which there are either no signs or nonstandard signs (e.g., not reflectorized, wrong message and/or color, improper placement, etc.) and institute an improvement program to provide signing and pavement marking in compliance with the MUTCD at all grade crossings.
- Paragraph 6c(1) (a) of the FHPM (6-8-2-1) provides that first priority shall be given to those grade crossings at which there are no warning signs or nonstandard signs.
- Mr. H. L. Anderson's memorandum of March 18, 1976, to Regional Federal Highway Administrators, Regions 1, 3 through 10, also provides that for those States that have obligated all of the safety funds available under 23 U.S.C. 405 (Safer Roads Demonstration Program), the purchase and installation of advance warning signs and reflectorized crossbucks at crossings off the Federal-aid system are eligible for 402 funds. This memorandum describes this activity as an excellent program for the States and requests Division Administrators to encourage their States to expedite this program. It also suggests that commitments be made by the States to provide this minimum level of protection at all public crossings in the State

within a reasonable period of time acceptable to the Division Administrator.

- A computer program, for use in connection with DOT/AAR national inventory data on grade crossings has been developed by the Office of Highway Planning's Program Management Division for checking grade crossing warning devices for compliance with MUTCD requirements and is available as described in Mr. C. W. Friesen's September 22, 1975, memorandum to Regional Federal Highway Administrators. Mr. H. L. Anderson's September 13, 1976, memorandum to all Regional Federal Highway Administrators distributed for use by our field offices a computer listing from this program of all crossings which may be deficient with respect to the minimum signing and marking requirements prescribed by the MUTCD.

All of the foregoing program information has been made available over the past several years to regions, divisions, and States but was contained in separate correspondence and documents. Implementation of this program calls for, as a minimum, meeting the MUTCD standards for signing and marking at all public grade crossings both on and off the Federal-aid system. These standards include, for each approach, the placement of reflectorized crossbucks and, with minor exceptions identified in the MUTCD, advance warning signs and pavement markings at all public railroad-highway grade crossings. To this end, Federal funds are eligible to participate in the cost of labor and materials to meet this minimum requirement either under Section 203 of the 1973 and 1976 Acts, 23 U.S.C. 405, 23 U.S.C. 219, or 23 U.S.C. 402 as indicated above.

The Offices of Engineering and Highway Safety recommend that the task of producing a schedule for this work, if not already instituted, be given prompt attention and

action, as appropriate, by regions, divisions, and States leading to the early advancement and completion of the grade crossing signing and marking program. Comments on the status and progress being made in this program shall be included by each division office in this monthly narrative report to Headquarters until all public grade crossings in the State are properly signed and marked.

/s/ Joseph W. Burdell, Jr.
W. J. WILKES, Director
Office of Engineering

/s/ James L. Foley
J. L. FOLEY, JR., Director
Office of Highway Safety

Federal Highway Administration
HNG-14/HHS-10:JEKirk:adj; 60104:9/29/76

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